IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 14, 2007 Session

ROMMIE DELEE STONE, JR. v. CATHY (STONE) CRAWFORD

Appeal from the Chancery Court for Hamblen County
No. 2001-659 Thomas R. Frierson, II

No. E2006-02187-COA-R3-CV - FILED OCTOBER 24, 2007

Cathy (Stone) Crawford ("Mother") and Rommie Delee Stone, Jr. ("Father") were divorced in 2002. Mother and Father have a son who is seven years old. Following the divorce, the parties operated under a residential co-parenting schedule which essentially split each party's co-parenting time on an equal basis, although Mother was designated as the primary residential parent. In 2005, Mother filed a petition to modify the parenting plan claiming, among other things, that the current schedule no longer worked once the child began school. Following a trial, the Trial Court concluded that a material change in circumstances had been proven such that it was appropriate and in the child's best interest to modify the existing residential parenting schedule by limiting Fathers' residential time with the child. Father appeals. We modify the judgment, affirm the judgment of the Trial Court as modified, and remand for further proceedings consistent with this Opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Jerrold L. Becker, Knoxville, Tennessee, for the Appellant, Rommie Delee Stone, Jr.

Douglas R. Beier, Morristown, Tennessee, for the Appellee, Cathy (Stone) Crawford.

OPINION

Background

Mother and Father were divorced in January of 2002. These post-divorce proceedings involve visitation issues with regard to the parties' son, who was born in March of 2000. The parties entered into a marital dissolution agreement and permanent parenting plan (the "Plan"), both of which were approved and adopted by the Trial Court at the time of the divorce. As relevant to this appeal, the Plan provides that the parties will share parenting responsibilities, but that Mother will be designated as the primary residential parent. The Plan also provides as follows:

> *Prior to enrollment in school*, the child will reside with Mother.… The [mother] is working three 12-hour shifts. On these days, the father will pick the child up from the baby sitter, and keep the child overnight. The parties will agree on other times that the child will be with the father so he will have the child on some weekends that he does not have to work, and on some [weekdays] he does not have to work. (emphasis added)
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> * * *
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> The father will have the child for one week in the summer for vacation beginning 2002, and so will the mother. As the child gets older, each parent will have the child for one week per month during June, July, and August.

The Plan also required Father to pay $250 per month in child support.

In October of 2005, Mother filed a petition to modify.[1] Mother claimed there was a material change in circumstances such that the then-current visitation schedule should be modified. Mother also claimed there was a material variance in the amount of child support Father should pay from what he was paying. Father responded to the petition and filed a counter-petition asserting that he should be designated as the child's primary residential parent.

A trial was held in August of 2007. Mother testified that the child had completed kindergarten and was now in the first grade. Mother was enrolled at that time in cosmetology school and no longer was working 12-hour shifts. Mother anticipated completing cosmetology school in four to five weeks. According to Mother, she and Father originally agreed that Father would have the child when Mother was working. Mother added:

[1] This petition also included allegations that Father was in contempt of court. The findings with regard to Mother's contempt petition are not at issue in this appeal.

> That way, I could work [a 12-hour shift] at least 3 days a week. Some weeks, I worked 4 days a week, so he would watch him then also, because not only was I working 12 hours, sometimes I'd be on call 12 hours. So, there's some times I didn't even get to go home. I would just sleep at the hospital a few hours to start the next shift.

Once the child started school, Mother cared for the child four days a week, and Father cared for the child the remaining three days. Mother testified that this original visitation schedule was no longer working and she was seeking a new visitation schedule which she explained as follows:

> I would like for [Father] to have [the child] two days a week during school time, and then in the summer be more flexible.… [O]n Sundays, it's very important for me to go to church. So, I don't think it is fair to [the child for Father] to have him every other weekend, because then he would miss church every other weekend [because Father does not go to church]. So, it would be more flexible if he had him like a couple of days during the week, and maybe like a Friday-Saturday.

Mother testified that in the proposed parenting plan she submitted to the Trial Court, Father would have the child, every week, from Monday at 3:30 p.m. until Tuesday morning when the child is taken to school. Father would also have the child, every week, from Friday after school at 3:30 p.m., until Saturday at 4:00 p.m.

Mother explained various problems she claims to have encountered when Father had the child. For example, occasionally Father would not inform Mother that the child needed to bring a particular item with him to school on Monday morning. At other times, the child had not completed his homework when he was returned to Mother.

Mother no longer works 12-hour shifts and she started cosmetology school in October of 2005. Mother hoped to open a day spa in the near future. Mother plans on opening up her own business so she can have more flexibility in her schedule to care for the child. Mother testified that the current schedule no longer works because the child needs much more consistency.

Father testified that he and Mother had agreed to equal co-parenting time. According to Father:

> The schedule's not been perfect. I've tried to be flexible and let her have him every Sunday, which I'd like to have him some Sundays.… I had him every weekend, which I really enjoyed. I loved to spend time with him, but recently she's been wanting to give me fewer days throughout the school year, but that's not necessary because I always

> took him to school on time. I would actually leave work early every day that I had him, and I'd pick him up. I'd be sitting there when school was out, and I'd take him home. [Mother] had an after school program that she [used].

Father denied ever allowing the child not to complete his homework and further denied not telling Mother what the child needed to take to school. According to Father, Mother moved across town which resulted in Father having to drive across town four days a week. When he asked Mother to make the drive at least once a week, she allegedly refused. Father requested the Trial Court adopt a parenting plan where each parent had custody of the child for a one week interval, i.e., seven days with Mother, then seven days with Father.

The Trial Court entered a judgment in September of 2006. As relevant to this appeal, the Trial Court determined that Mother should remain as the child's primary residential parent. With regard to Father's co-parenting time, the Trial Court stated:

> At the time of the entry of the Permanent Parenting Plan, [Mother] was working a significant number of hours each week. She currently is unemployed due to her enrollment in school. She anticipates that her course of instruction will soon be completed and that she will be working as a licensed cosmetologist. [Mother] aspires to be an owner and sole proprietor of a day spa, planning that such work responsibilities will afford her greater flexibility regarding her co-parenting time with the child.
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> [Father's] work schedule affords him reasonable flexibility regarding the scheduling of co-parenting time with the child. Both parents agree that a defined, residential schedule of co-parenting responsibilities will provide the minor child with the consistency and certainty needed to protect and promote his manifest best interests. Both parents maintain … loving, affectionate and emotional ties with the child and they are adequately disposed of providing their son with food, clothing, medical care, education and other necessary care.
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> These changes of circumstances have occurred since the entry of the Permanent Parenting Plan. The changes have affected the child's well being in a meaningful way so that the present circumstances make the current Parenting Plan no longer in the child's best interests. However, these changes have not been of such a nature so as to warrant a change in the designation of primary residential parent status. Instead, a material change of circumstances supports a modification in parenting responsibilities and schedules.…

The Trial Court then determined that it would be in the child's best interests to adopt a visitation schedule which gave Father co-parenting time as follows: (1) from Thursday at 3:00 p.m. to Sunday at 9:00 a.m. every other week; and (2) on Tuesday from 3:00 p.m. to 8:00 p.m. every week. The Trial Court then developed a schedule for fall break, winter break, and the various holidays. For the summer vacation, the Trial Court determined that the regular parenting schedule would apply except that Father would have three additional nonconsecutive weeks beginning in 2007.

Father appeals claiming the Trial Court erred when it modified the visitation schedule thereby eliminating the equal co-parenting schedule previously adhered to by the parties. Father also claims that the new schedule is not in the child's best interests.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Existing custody arrangements are favored since children thrive in stable environments. *Aaby v. Strange*, 924 S.W.2d 623, 627 (Tenn. 1996); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A custody decision, once made and implemented, is considered *res judicata* upon the facts in existence or those which were reasonably foreseeable when the initial decision was made. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). However, our Supreme Court has held that a trial court may modify an award of child custody "when both a material change of circumstances has occurred and a change of custody is in the child's best interests." *See Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn. 2002). According to the *Kendrick* Court:

> As explained in *Blair [v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002)], the "threshold issue" is whether a material change in circumstances has occurred after the initial custody determination. *Id*. at 150. While "[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody," the following factors have formed a sound basis for determining whether a material change in circumstances has occurred: the change "has occurred after the entry of the order sought to be modified," the change "is not one that was known or reasonably anticipated when the order was entered," and the change "is one that affects the child's well-being in a meaningful way." *Id*. (citations omitted).

Kendrick, 90 S.W.3d at 570.

The *Kendrick* Court went on to explain that if a material change in circumstances has been proven, "it must then be determined whether the modification is in the child's best interests … according to the factors enumerated in Tennessee Code Annotated section 36-6-106." *Kendrick*, 90 S.W.3d at 570. It necessarily follows that if no material change in circumstances has been proven, the trial court "is not required to make a best interests determination and must deny the request for a change of custody." *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999). If a material change in circumstances has been proven, when undertaking a best interests analysis Tenn. Code Ann. § 36-6-106 (a) (2005) requires the court to consider the following:

> (1) The love, affection and emotional ties existing between the parents and child;
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> (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
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> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; …
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> (4) The stability of the family unit of the parents;
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> (5) The mental and physical health of the parents;
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> (6) The home, school and community record of the child;
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> * *
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> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;
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> (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child; and
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> (10) Each parent's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a).

Returning to the present case, the parties are in disagreement over whether Tenn. Code Ann. § 36-6-101(a)(2)(B) or (a)(2)(C) applies to this case. These statutory provisions are quite similar and provide, in relevant part, as follows:

> (B) If the issue before the court is a modification of the court's prior decree *pertaining to custody*, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.…
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> (C) If the issue before the court is a modification of the court's prior decree *pertaining to a residential parenting schedule*, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child. (emphasis added)

As noted previously, Father requested a change in custody when he sought to be designated as the child's primary residential parent. Mother did not seek a change in custody because she wanted to remain the primary residential parent. Instead, Mother sought a modification of the residential parenting schedule. Therefore, both statutory sections were relevant, depending on whether the Trial Court was considering Father's request for a change in custody, or Mother's request for a change in the residential parenting schedule.

Father does not appeal the Trial Court's decision that Mother should remain the child's primary residential parent. Father does, however, challenge the Trial Court's modification of his co-parenting schedule, which necessarily implicates Tenn. Code Ann. § 36-6-101(a)(2)(C). This statutory provision expressly provides that a material change in circumstances, for purposes of modifying a visitation schedule, may include "significant changes in the needs of the child over time,

which may include changes relating to age; [and] significant changes in the parent's living or working condition that significantly affect parenting …." Tenn. Code Ann. § 36-6-101(a)(2)(C).

Due to the child's need for more consistency as he reached school age, as agreed to by both parties, we are unable to conclude that the evidence preponderates against the Trial Court's conclusion that a material change in circumstances was proven such that a modification of the residential parenting schedule was necessary and in the child's best interest. Along this line, we note that the original Plan set forth the visitation schedule after saying that the schedule was applicable "[p]rior to [the child's] enrollment in school." We believe this demonstrates the parties' original understanding that the co-parenting schedule would be revisited once the child began school, and that this provides additional support for the Trial Court's decision to modify the residential parenting schedule.

The next issue is whether the new schedule adopted by the Trial Court was in the child's best interest. The new parenting plan essentially gives Father two days every other week with the child, as well as one evening each week. What troubles us about the amount of co-parenting time awarded to Father is that Mother testified that Father should be given two days each week and that even with the child being with his Father two full days each week, Mother believed the child would receive the needed consistency. We believe the parenting plan should maximize Father's co-parenting time while still providing the child with more consistency.

The parenting plan adopted by the Trial Court unnecessarily awards Father, by all accounts a good, loving, and competent parent who has been fully involved in the child's life, too little co-parenting time to be in the best interest of the child. We remand this case to the Trial Court to develop a co-parenting schedule where Father is given at least two full days each week with the child, in addition to his having the child every Tuesday from 3:00 p.m. until 8:00 p.m. The Trial Court also is instructed to modify the parenting plan such that Mother and Father equally split the summer vacation when the child is not in school. Finally, the Trial Court must determine whether Father's child support payment should be modified, consistent with the child support guidelines, when taking into account Father's increased co-parenting time. In all other respects, the judgment of the Trial Court is affirmed.[2]

[2] It is important to note that both Mother and Father appear to be very good parents and there is nothing in the record to indicate that either parent will not properly take care of the child. The record also establishes that Mother and Father cooperated with each other most of the time, to their credit. We can only hope such cooperation continues in the future.

Conclusion

The judgment of the Trial Court is modified and is affirmed as so modified, and this case is remanded for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed one-half to the Appellant, Rommie Delee Stone, Jr., and his surety, and one-half to the Appellee, Cathy (Stone) Crawford.

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D. MICHAEL SWINEY, JUDGE